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Public Restrooms and the Distorting of Transgender Identity

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PUBLIC RESTROOMS AND THE DISTORTING OF TRANSGENDER IDENTITY*

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The sex-separated public restroom, a ubiquitous feature of our built environment, has been at the vortex of litigation filed by state officials across the country challenging the Obama administration's attempt to assure that transgender people have access to safe restrooms. Tracing the ongoing federal litigation in North Carolina surrounding the passage of House Bill 2, this Article argues that this seemingly mundane architectural space has in fact driven the litigation strategies of all parties to these cases. In insisting that access to public restrooms be based on biological sex, state officials rely on an outmoded nineteenth century cultural vision of women as weak and vulnerable, and therefore in need of a separate restroom to protect them from predatory men in the public realm. In contrast, in a bold attempt to protect transgender people, the Obama administration took for granted that public restrooms should be sex-separated. The administration insisted, however, that individuals be permitted to access the men's or the women's facility based on their gender identities. In so doing, the federal government ignored that gender identity is not binary and, accordingly, that there are individuals for whom there is no safe, accessible restroom in public places. This Article concludes by proposing that sex-segregated public restrooms be replaced by all-gender, multi-user facilities that protect the privacy and safety concerns of all patrons, while discriminating against no one.

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INTRODUCTION

A morality play is now unfolding in federal district court in North Carolina arising from the enactment of North Carolina's Public Facilities Privacy and Security Act ("H.B. 2") in March 2016.[1] H.B. 2 provided in pertinent part: "Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student

1. Public Facilities Privacy & Security Act (H.B. 2), secs. 1.2–.3, §§ 115C-521.2, 142-760, 2016-2 N.C. Adv. Legis. Serv. 1 (LexisNexis), *repealed by* An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws __. On March 28, 2016, three transgender plaintiffs, Equality North Carolina, and the American Civil Liberties Union ("ACLU") filed an action in the United States District Court for the Middle District of North Carolina against then-Governor Patrick McCrory, the University of North Carolina, then-Attorney General Roy Cooper, as well as the president pro tempore of the state senate and the speaker of the state house of representatives, alleging that H.B. 2 discriminated against the plaintiffs in violation of Title IX of the Education Amendments of 1972 ("Title IX") and the equal protection and due process clauses of the Fourteenth Amendment. Complaint for Declaratory and Injunctive Relief at 43–44, Carcaño v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 1:16-CV-00236) [hereinafter Carcaño Complaint].

On May 9, 2016, the United States filed a separate action against the State, the Governor, the Department of Public Safety, and the University of North Carolina challenging H.B. 2 as prohibited sex discrimination under Title IX, the Violence Against Women Reauthorization Act of 2013, and Title VII. Complaint for Declaratory Judgment at 1–2, United States v. State, No. 1:16-cv-00425 (M.D.N.C. May 9, 2016) [hereinafter Obama DOJ Complaint].

On that same day, state officials filed two separate actions. In the first, Governor McCrory and Secretary Perry of the North Carolina Department of Public Safety sought declaratory and injunctive relief, seeking declarations, *inter alia*, that H.B. 2 did not violate federal law. Complaint for Declaratory Judgment at 1, McCrory v. United States, No. 5:16-cv-00238-BO (E.D.N.C. May 9, 2016) [hereinafter McCrory Complaint]. In the second, Phil Berger, the president pro tempore of the state senate, and Tim Moore, the speaker of the state house of representatives, similarly sought a declaration, *inter alia*, that H.B. 2 did not violate federal law. Complaint for Declaratory Relief at 1–2, Berger v. U.S. Dep't of Justice, No. 5:16-cv-00240-FL (E.D.N.C. May 9, 2016) [hereinafter Berger Complaint]. Throughout this Article, the various North Carolina officials who litigated in the federal court action will be referred to as the "State plaintiffs."

use to be designated for and used only by students based on their biological sex."[2]

This courtroom drama pits two powerful opponents against one another. On one side are transgender plaintiffs and their supporters—the U.S. Department of Justice under the Obama administration (the "Obama DOJ") and civil rights groups.[3] On the other side are various state officials, including the former governor, the former secretary of the Department of Public Safety, and leaders of both chambers of the North Carolina General Assembly (collectively, "State plaintiffs").[4] The

2. Public Facilities Privacy & Security Act (H.B. 2), sec. 1.2, § 115C-521.2(b), 2016-2 N.C. Adv. Legis. Serv. at 2. On March 23, 2016, the North Carolina General Assembly enacted the "Public Facilities Privacy & Security Act." *Id.* The law defined "Biological Sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.* sec. 1.2, § 115C-521.2(a)(1). H.B. 2 was enacted to overturn an ordinance adopted by the Charlotte City Council that, *inter alia*, effectively allowed transgender people to use public restrooms in accord with their gender identity. Charlotte, N.C., Ordinance 7056-X (Feb. 22, 2016); *see* Steve Harrison & Jim Morrill, *After LGBT Vote, NC House Speaker Says Lawmakers Will "Correct This Radical Course"*, CHARLOTTE OBSERVER (Feb. 23, 2016, 9:59 AM), http://www.charlotteobserver.com/news/politics-government/article61932507.html [http://perma.cc/NG8D-APRD].

3. *See supra* note 1. The arguments in this Article rely solely on the pro-lesbian, gay, bisexual, and transgender ("LGBT") policy positions taken by the Obama DOJ and the Department of Education ("ED") that form the basis of their complaint in this litigation, and not on subsequent statements of the Trump administration.

The Obama DOJ expressed its policy position in the Dear Colleague Letter on Transgender Students, jointly issued by the DOJ and the ED on May 13, 2016, and directed to public schools receiving federal funding. U.S. Dep't of Educ. & U.S. Dep't of Justice, Opinion Letter on Transgender Students (May 13, 2016) [hereinafter Opinion Letter on Transgender Students], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/AG3W-T9QK]. That document required that, for purposes of Title IX, "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." *Id.* at 3. That position undergirds the DOJ's complaint filed in the North Carolina federal litigation discussed herein.

On February 22, 2017, the Trump administration's Department of Justice (the "Trump DOJ") and ED issued a letter withdrawing the Dear Colleague Letter on Transgender Students. U.S. Dep't of Educ. & U.S. Dep't of Justice, Opinion Letter on Withdrawal of Title IX Guidance Documents 1–2 (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download [https://perma.cc/WAD3-RRR2]. That document states in pertinent part: "[T]he [ED] and the [DOJ] have decided to withdraw and rescind [the Dear Colleague Letter] in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within [the Dear Colleague Letter]." *Id.* at 1; *see* Sandhya Somashekhar, Emma Brown & Moriah Balingit, *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.1895f49e273c [https://perma.cc/G8QU-4MA8].

4. After successfully moving to intervene in both *Carcaño v. McCrory* and *United States v. State*, the Berger plaintiffs voluntarily dismissed their claims in their original suit. *See* Carcaño v. McCrory, 203 F. Supp. 3d 615, 628–29 (M.D.N.C. 2016) (discussing procedural

backdrop is a commonplace setting: two adjacent public restrooms, one labeled Men's and one labeled Women's.

This Article argues that this seemingly mundane backdrop is, in fact, the protagonist of the drama. The architectural space of the sex-separated restroom is an unchanging, unchallenged constant at the heart of the controversy. In a subtle yet undeniable way, the configuration of this space and its cultural history have controlled the litigation strategies of all parties. In the Obama DOJ's bold attempt to protect the rights of transgender people, the sex-separated restroom forced the federal government to distort the nature of transgender identity by ignoring the existence of transpeople[5] and others who do not self-identify as male or female, and thus cannot be readily assigned to one or the other restroom.[6] In contrast, in attempting to protect the "privacy and dignity"[7] of North Carolina citizens and the "bodily privacy rights"[8] of state employees, the State plaintiffs relied not only on the binary separation of public restrooms but also on the nineteenth century cultural history that cloaks this space to craft a melodrama with transwomen as the predatory and psychologically disturbed villains at the center of the tale.[9] For both sides in the litigation, the existing architectural configuration of the public restroom combined with its social history overdetermine the meanings of human bodies and the identities associated with those bodies.[10]

history). In September 2016, former Governor McCrory dropped his lawsuit against the DOJ in the Eastern District of North Carolina, citing "the substantial costs to the state" and "the interests of judicial economy." Plaintiff's Notice of Voluntary Dismissal Without Prejudice at 3, McCrory v. United States, No. 5:16-cv-00238-BO (E.D.N.C. Sept. 16, 2016).

5. *See infra* text accompanying note 74. Throughout this Article, transgender individuals will occasionally be referred to as "transpeople."

6. *See* discussion *infra* at note 74; *see also infra* Section II.A.

7. Berger Complaint, *supra* note 1, ¶ 2.

8. McCrory Complaint, *supra* note 1, ¶ 1.

9. *See* discussion *infra* at note 104; *see also infra* Section II.C.

10. Most discussions of the "bathroom problem," have focused on bodies and human psychology. *See, e.g.*, ROBYN LONGHURST, BODIES: EXPLORING FLUID BOUNDARIES 66 (2001) ("Toilets/bathrooms are often used as spaces in which bodily boundaries are broken and then made solid again."); Kath Browne, *Genderism and the Bathroom Problem: (Re)materialising Sexed Sites, (Re)creating Sexed Bodies*, 11 GENDER, PLACE & CULTURE 331, 332–33 (2004) ("Toilets, as sites that are separated by the presumed biological distinction between men and women and their different excretionary functions, can be sites where individuals' bodies are continually policed and (re)placed within sexed categories."). Commentators have often addressed this issue from the perspective of queer theory, which aims "to demonstrate that gender and sexual categories are not given but constructed." JENNIFER MARCHBANK & GAYLE LETHERBY, INTRODUCTION TO GENDER: SOCIAL SCIENCE PERSPECTIVES 257 (2007). For a major work which applies queer theory to facilitate an understanding of public restrooms, see SHEILA L. CAVANAGH, QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION 5 (2010) ("This book endeavours to theorize *how* and *why* the public washroom is a site for gender-based hostility, anxiety,

This Article draws from cultural geographers[11] and critical architectural theorists,[12] who decry the tendency of many scholars to assume that the spaces in which interactions between people take place are but inert stages on which the real human drama unfolds. In the North Carolina litigation, no one has dared to suggest that the true villain undermining the rights of transgender people might be the existing binary configuration of the ubiquitous sex-separated restroom.

This Article focuses on the North Carolina federal court litigation, in part because the pleadings so powerfully illustrate the profound impact that the built environment has on litigation strategies in lawsuits involving public restrooms. Similar litigation over the impact of Title VII of the Civil Rights Act of 1964 ("Title VII") and Title IX of the Education Amendments of 1972 ("Title IX") on the rights of transgender students in relation to restroom use is also pending in other

fear, desire, and unease in the present day as the washroom is also a site of homoerotic desire."). This Article focuses instead on the configuration of architectural space and the ways in which such space can determine and convey cultural understandings about sex, gender, and sexuality.

11. *See, e.g.*, THE ROUTLEDGE RESEARCH COMPANION TO GEOGRAPHIES OF SEX AND SEXUALITIES back cover (Gavin Brown & Kath Browne eds., 2016) ("[T]his state-of-the-art review both charts and develops the rich sub-discipline geographies of sexualities, exploring sex-gender, sexuality and sexual practices. . . . Developing thinking in this area, geographers and other social scientists have illustrated the centrality of place, space and other spatial relationships in reconstituting sexual practices, representations, desires, as well as sexed bodies and lives.") Cultural geographer Michael Landzelius has noted:

> [T]he question of sexing, sexualizing, and gendering space is not simply about those sexed, sexualized, and gendered practices/performances that take place in a particular space, but just as much about those practices in political, legislative, and planning bodies, architectural offices, etc., etc., that through the imposition of various kinds of norms and regulations constitute that space in a particular fashion.

Michael Landzelius, *Gender—Part I*, *in* THE WILEY-BLACKWELL COMPANION TO HUMAN GEOGRAPHY 486, 495 (John Agnew & James S. Duncan eds., 2011).

12. *See, e.g.*, LESLIE KANES WEISMAN, DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT 2 (1992) ("Space, like language, is socially constructed; and like the syntax of language, the spatial arrangements of our buildings and communities reflect and reinforce the nature of gender, race, and class relations in society. The uses of both language and space contribute to the power of some groups over others and the maintenance of human inequality."); *see also* AARON BETSKY, BUILDING SEX: MEN, WOMEN, ARCHITECTURE, AND THE CONSTRUCTION OF SEXUALITY xvii (1995) ("[A]rchitecture in its broadest sense is how we construct our sexualities in the real world and thus define ourselves in a given place and time."); AARON BETSKY, QUEER SPACE: ARCHITECTURE AND SAME-SEX DESIRE 5 (1997) ("In this book, I will try to describe what I mean by [queer space]. It is a kind of space that I find liberating, and that I think might help us avoid some of the imprisoning characteristics of the modern city. It is a useless, amoral, and sensual space that lives only in and for experience."); Joel Sanders, *Introduction* to STUD: ARCHITECTURES OF MASCULINITY 11, 12 (Joel Sanders ed., 1996) ("*Stud* invites both theorists and architects, writers and artists, to expand the notion of cultural construction by investigating the active role that architectural constructions play in the making of gender.").

courts, most notably in *G.G. ex rel. Grimm v. Gloucester County School Board*.[13] In March 2017, as a result of the Trump administration's DOJ and ED withdrawing previously issued guidance establishing protections for transgender students, the Supreme Court vacated the judgment of the lower court and remanded the case.[14] In addition, in May 2016, the State of Texas joined with eight other states and various state officials in filing an action against the United States in a Texas federal district court challenging the Obama DOJ and ED's interpretation of Title VII and Title IX to require that restroom access in public schools be based on

13. 822 F.3d 709, 715 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369 (2016) (mem.), *and vacated and remanded* 2017 WL 855755 (U.S. 2017); *see* Robert Barnes & Moriah Balingit, *Supreme Court Takes Up School Bathroom Rules for Transgender Students*, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae_story.html [https://perma.cc/7EVV-7UUA].

In amicus briefs filed in the Supreme Court on behalf of the defendants, conservative groups, in addition to arguing federal overreaching, *see, e.g.*, Brief of Amicus Curiae Wisconsin Institute for Law & Liberty in Support of Petitioner at 7–10, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, __ S. Ct. __ (2017) (mem.) (No. 16-273), 2017 WL 855755, made a number of arguments that directly stigmatized transgender identity, *see, e.g.*, Brief Amicus Curiae of Foundation for Moral Law in Support of Petitioner at 2, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, __ S. Ct. __ (2017) (mem.) (No. 16-273), 2017 WL 855755 (claiming that allowing Gavin Grimm to succeed "will encourage more young people to question their gender identity, likely causing confusion, trauma, turmoil and other unfortunate consequences"); Brief of Christian Educators Ass'n International et al. as Amici Curiae in Support of Petitioner at 17, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, __ S. Ct. __ (2017) (mem.) (No. 16-273), 2017 WL 855755 (adopting the Obama DOJ's interpretation of Title IX and its regulations "imposes immorality into schools by promoting conduct (selecting a 'gender identity') contrary to biological and Biblical teachings"); Brief of Amicus Curiae of Alliance Defending Freedom in Support of Petitioner at 14, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, __ S. Ct. __ (2017) (mem.) (No. 16-273), 2017 WL 855755 ("Because the fluid continuum of gender identity is divorced from the real physical differences between boys and girls, when the transgender students demand access to opposite sex facilities, they have no basis to advance a bodily privacy claim.").

In March 2017, the United States Supreme Court vacated the judgment of the U.S. Court of Appeals of the Fourth Circuit and remanded the case "for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017." *Gloucester Cty. Sch. Bd.*, __ S. Ct. at __, 2017 WL 855755, at *1; *see supra* note 3.

14. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, __ S. Ct. __ (2017) (mem.), 2017 WL 855755, at *1 (vacating and remanding the Fourth Circuit decision "for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017"); *see* Letter from Edwin S. Kneedler, Deputy Solicitor General, U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk, U.S. Supreme Court (Feb. 22, 2017), http://www.scotusblog.com/wp-content/uploads/2017/02/16-273-2.22.17-DOJ-Cover-Letter-Guidance.pdf [https://perma.cc/9RBZ-336N]; *see supra* note 4 and accompanying text; *see also* Adam Liptak, *Supreme Court Won't Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html [https://perma.cc/5QEM-98GU].

gender identity and not biological sex.[15] Following the Trump DOJ and ED's change of position with respect to transgender students and public restrooms, the plaintiff States voluntarily dismissed the action without prejudice on March 3, 2017.[16]

On March 29, 2017, Governor Roy Cooper and the North Carolina General Assembly reached a compromise to repeal H.B. 2 by enacting a new bill, H.B. 142, into law.[17] H.B. 142 repealed H.B. 2, but effectively left H.B. 2's state preemption on regulation of bathroom accessibility in place, and imposed a moratorium on the adoption of new local nondiscrimination ordinances through 2020.[18] Following the enactment of H.B. 142, the Trump DOJ and the state officials jointly stipulated to dismiss all claims and counterclaims brought in the Obama DOJ's original action.[19] Because many in the LGBT community were unhappy with the terms of the compromise, the ACLU and other litigants have signaled plans to continue litigating this issue and amend their original complaint to challenge the newly enacted H.B. 142.[20]

Part I explores the architectural and cultural history of the sex-separated restroom in the United States, a history that began with the factory water closet in the late nineteenth century and the first state laws regulating that space. Part II presents a brief introduction to

15. Complaint for Declaratory and Injunctive Relief at 2–3, Texas v. United States, 201 F. Supp. 3d 810 (No. 7:16-cv-00054-O) (N.D. Tex. 2016), ECF No. 1. The district court granted the plaintiffs' motion for a preliminary injunction, enjoining the Obama DOJ and ED from taking any further action pursuant to this interpretation. Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016), *order clarified by* Order, No. 7:16-cv-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 19, 2016), *appeal docketed*, No. 16-11534 (5th Cir. Oct. 20, 2016). In the North Carolina litigation, the district court declined to follow this ruling, relying on the Fourth Circuit's holding in the *Grimm* case. Carcaño v. McCrory, 203 F. Supp. 3d 615, 635 (M.D.N.C. 2016).

16. Plaintiffs' Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. Mar. 3, 2017), ECF No. 128. The plaintiffs agreed to dismiss the action after the United States dismissed its appeal of the district court's preliminary injunction before the Fifth Circuit. Unopposed Motion for Voluntary Dismissal at 1–2, Texas v. United States, No. 1611534 (5th Cir. Mar. 2, 2017).

17. An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws __, __; *see* Matthew Burns & Laura Leslie, *HB2 Repealed, But Many Unhappy with "Reset"*, WRAL (Mar. 30, 2016, 10:05 PM), http://www.wral.com/hb2-repealed-but-many-unhappy-with-reset-/16615133/ [https://perma.cc/7RWP-Z9K2].

18. An Act to Reset S.L. 2016-3 (H.B. 142), 2017 N.C. Sess. Laws at __; *see* Will Doran, *What Changes (and What Doesn't) in HB2 Replacement Bill*, NEWS & OBSERVER (Mar. 28, 2017, 6:38 PM), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article141821679.html [https://perma.cc/P5W6-CHCP].

19. Joint Stipulated Notice of Dismissal at 1, United States v. State, No. 1:16-cv-00425-TDS-JEP (M.D.N.C. Apr. 14, 2017), ECF No. 245.

20. Press Release, Am. Civil Liberties Union, ACLU and LAMBDA Condemn 'Fake' Repeal of HB2 (March 30, 2017), https://www.aclu.org/news/aclu-and-lambda-legal-condemn-fake-repeal-hb-2 [https://perma.cc/PA65-CC7L].

contemporary understandings of transgender identity. It then examines how the existing binary layout of the public restroom and the cultural understandings surrounding that space forced the parties to the North Carolina litigation to distort transgender identity. Part III then looks to scholars who have had the temerity to imagine alternative ways to configure public restrooms that do not divide that space on the basis of sex, but rather in ways that support the needs of everyone for safe, accessible restrooms when they enter the public realm.

I. LAW, CULTURE, AND THE PUBLIC RESTROOM

To appreciate the central role that the sex-separated public restroom has played in the ongoing North Carolina litigation, one must answer two questions about the history of that space. First, what led to separating public restrooms by sex in the first place? Second, what cultural understandings surrounding that space have been inherited from late nineteenth century understandings about women, men, their bodies, and their relationships?

A. The History of Sex Separation of Public Restrooms in the United States

In a sense, public restrooms in the United States have always been separated by sex. Early in our country's history, restrooms were all single-user water closets, privies, or outhouses, which effectively kept two people (of the same or opposite sex) from using that space at the same time.[21] Despite the State plaintiffs' assertion that the sex-separated restroom "has been an accepted part of our Nation's social compact since time out of mind,"[22] in fact, the multi-user public restroom—at the vortex of the North Carolina litigation—dates back only to the 1870s when public works technology had advanced to a point that enabled effluence to be transported from buildings through municipal sewer systems.[23]

The first laws in the United States mandating that public restrooms be separated by sex, enacted in the late nineteenth century, were

21. *See* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 38 (2007) [hereinafter Kogan, *Sex-Separation*]; *see also* Maya Rhodan, *Why Do We Have Men's and Women's Bathrooms Anyway?*, TIME (May 16, 2016), http://time.com/4337761/history-sex-segregated-bathrooms/ [https://perma.cc/Z7MM-QFKJ].

22. Berger Complaint, *supra* note 1, ¶ 9, at 4.

23. *See Kogan*, *Sex-Separation*, *supra* note 21, at 35–39; *see also* Wendy C. Perdue, Lawrence O. Gostin & Lesley A. Stone, *Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 558 (2003).

directed at factories and other workplaces where men and women worked side-by-side.[24] In previous work, I have explored the origins of these laws and will only briefly recount that history.[25] Factory toilet laws can be traced back to the early nineteenth century when, as a result of the industrial revolution, men left the home to work in factories and women remained behind, rearing children and tending hearth fires.[26] There arose in America a "separate spheres" ideology—the notion that the public realm was the proper place for men and the private home the proper place for women.[27]

This sentimental vision of the virtuous and vulnerable woman remaining in her domestic haven was a cultural myth that bore little resemblance to the evolving realities of the nineteenth century. From the outset of the century, the demands of a burgeoning economy forced women from the privacy of the home into the workplace and American civic life.[28] Nonetheless, American culture clung tenaciously to the separate spheres ideology, and any move by a woman outside of the home was viewed with suspicion and anxiety.[29] As a result, by mid-

24. Terry S. Kogan, *Sex-Separation: The Cure-All for Victorian Social Anxiety*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 145 (Harvey Molotch & Laura Norén, eds., 2010) [hereinafter Kogan, *Cure-All*]. In Victorian America great anxiety surrounded the fact and men and women worked together in factories. *See, e.g.*, *id.* There was widespread acceptance among sanitation professionals that factory restrooms should be separated by sex. *See, e.g.*, GEORGE M. PRICE, THE MODERN FACTORY: SAFETY, SANITATION AND WELFARE 277 (1914) [hereinafter PRICE, THE MODERN FACTORY] ("All industrial and sanitary codes demands [sic] separate water-closet compartments for the sexes in every factory where men and women are employed.").

25. *See generally* Kogan, *Sex-Separation*, *supra* note 21 (exploring the legal, historical, and cultural influences surrounding the development of sex-separated restrooms); Kogan, *Cure-All*, *supra* note 24 (exploring the institution of sex-separated bathrooms in the United States during the late nineteenth century); Terry S. Kogan, *How Did Public Bathrooms Get to Be Separated by Sex in the First Place?*, CONVERSATION (May 26, 2016, 10:03 PM), https://theconversation.com/how-did-public-bathrooms-get-to-be-separated-by-sex-in-the-first-place-59575 [https://perma.cc/D8MA-N7LF] [hereinafter Kogan, CONVERSATION] (discussing the development of sex-separated restrooms in the United States).

26. *See, e.g.*, DAVID E. SHI, FACING FACTS: REALISM IN AMERICAN THOUGHT AND CULTURE 1850–1920, at 17 (1995) ("As the more complex economy of the nineteenth century matured, economic production was increasingly separated from the home, and the absence of men who left to work long hours in the city transformed the middle-class home into a 'separate sphere' governed by mothers.").

27. *See id.* at 17; Kogan, *Sex-Separation*, *supra* note 21, at 20. *See generally* Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988) (describing the "separate spheres" ideology and analyzing its application to the study of women's history in the United States).

28. *See* Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J.L. & GENDER 169, 175 (2008); Kogan, CONVERSATION, *supra* note 25.

29. Kerber, *supra* note 27, at 28–30; Kogan, CONVERSATION, *supra* note 25.

century, legislators began enacting protective labor legislation aimed at protecting the vulnerable, weaker bodies of women workers.[30]

In their quest to protect women, regulators also set their sights on manipulating other public spaces besides the factory. Specifically, they cordoned off areas in a variety of venues for the exclusive use of women. For example, a separate ladies' reading room became an accepted part of American public library design.[31] American railroads began designating a "ladies' car" for the exclusive use of women and their male escorts.[32] By the end of the nineteenth century, women-only parlor spaces had been created in photography studios, hotels, banks, and department stores.[33]

It was in the spirit of manipulating public space to protect weak and vulnerable women that legislators enacted the first laws mandating that factory restrooms be separated by sex.[34] The first such law was enacted in Massachusetts in 1887.[35] By 1920, forty-three states had adopted

30. *See* Kogan, *Sex-Separation*, *supra* note 21, at 11–16. Examples included laws that limited women's work hours, laws that required a rest period for women during the work day or seats at their work stations, and laws that prohibited women from taking certain jobs and assignments considered dangerous. *See* Barzilay, *supra* note 28, at 180–81; Kogan, *Sex-Separation*, *supra* note 21, at 13–16.

31. Kogan, *Sex-Separation*, *supra* note 21, at 30; Abigail A. Van Slyck, *The Lady and the Library Loafer: Gender and Public Space in Victorian America*, 31 WINTERTHUR PORTFOLIO 221, 227–30 (1996).

32. Richard H. Chused, *Courts and Temperance Ladies*, 21 YALE J.L. & FEMINISM 339, 367 (2010); Kogan, *Sex-Separation*, *supra* note 21, at 31.

33. Kogan, *Sex-Separation*, *supra* note 21, at 33; Van Slyck, *supra* note 31, at 223.

34. *See, e.g.*, Brief of Amicus Curiae Professor Terry S. Kogan in Support of Respondent at 11–15, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, __ S. Ct. __ (2017) (mem.) (No. 16-273), 2017 WL 855755. Factory toilets laws were often adopted as extensions to existing protective labor legislation aimed at women and children. *See, e.g.*, Act of May 25, 1887, ch. 462, § 13, 1887 N.Y. Laws 575, 577 ("An act to regulate the employment of women and children in manufacturing establishments . . . .").

35. Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668, 669; *see* Kogan, *Sex-Separation*, *supra* note 21, at 15. Entitled "An Act to Secure Proper Sanitary Provisions in Factories and Workshops," the Massachusetts statute stated in pertinent part:

> [W]herever male and female persons are employed in the same factory or workshop, a sufficient number of separate and distinct water-closets, earth-closets or privies shall be provided for the use of each sex and shall be plainly designated, and no person shall be allowed to use any such closet or privy assigned to persons of the other sex.

§ 2, 1887 Mass. Acts at 669. The first law in North Carolina related to sex separation of toilets was enacted in 1913 and reflects cultural values related not only to sex, but also to race:

> That all persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females . . . shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to separate the white and colored males and females of both sexes.

similar legislation.[36] Any suggestion that such legislation was adopted for gender-neutral reasons is belied not only by the legislative titles,[37] but also by the very language of such laws.[38] As I have previously argued, the enactment of factory toilet laws was a last-ditch attempt by Victorian legislators to bolster the moribund separate spheres ideology and recapture the lost world of the early nineteenth century.[39]

B. The Turn of the Century Cultural Understandings of Sex-Separated Restrooms

Sex-separated restrooms are ubiquitous in contemporary society. That architectural space remains, however, cloaked in an ideology inherited from the late nineteenth century, a vision that influences how our society views the very identities of women and men when they enter the public realm.[40]

Act of Mar. 8, 1913, ch. 83, § 1, 1913 N.C. Sess. Laws, 127, 127.

36. George Martin Kober, *History of Industrial Hygiene and Its Effect on Public Health*, *in* A HALF CENTURY OF PUBLIC HEALTH 361, 377 (Mazÿck P. Ravenel ed., 1921); *see, e.g.*, *supra* note 35; *infra* notes 37–38.

37. *See, e.g.*, Act of Mar. 6, 1891, 1891 Ohio Laws. 87, 87 ("An act for the preservation of the health of female employes [sic]"); *see also* Act of Jan. 27, 1897, ch. 98, Tenn. Pub. Acts 247, 247 ("AN ACT to require employers of females to provide separate water-closets for them.").

38. *See, e.g.*, Act of May 29, 1901, No. 206, § 10, 1901 Pa. Laws 322, 323–24 ("A suitable and proper wash and dressing room and water closets shall be provided for males and females, where employed . . . and the water closets used by females shall not adjoin those used by males, but shall be built entirely away from them, shall be properly screened and ventilated, and at all time kept in a clean condition.").

39. *See* Kogan, *Sex-Separation*, *supra* note 21, at 55.

40. The late nineteenth century cultural understanding of public restrooms was carried forward to the present day through model building codes, first adopted in the 1920s. *See, e.g.*, PAC. COAST BLDG. OFFICIALS CONFERENCE, THE PACIFIC COAST UNIFORM BUILDING CODE: ITS HISTORY AND PURPOSES & THE PACIFIC BUILDING OFFICIALS CONFERENCE 4 (1929). The ostensible purpose of these codes was to assure health and safety in all aspects of building construction. For example, a set of "Questions and Answers" that accompanied the first edition of the Pacific Coast Building Officials Conference's 1929 Uniform Building Code answers the question "What is its purpose?" with the following:

> The purpose of the Uniform Code is: first, to furnish in one book the fundamental requirements necessary to enable the city building official to provide building regulations in accordance with modern building methods so that he may adequately insure public health, safety and welfare; and second, to provide uniformity insofar as fundamental are concerned.

Id.

These codes were formulated by regional industry groups with the goal that municipalities would enact a model code in its entirety, thereby assuring uniformity of building practices in a particular region. *See, e.g.*, AM. INST. ARCHITECTS, AN ARCHITECT'S GUIDE TO BUILDING CODES & STANDARDS 13 (3d ed. 1991) ("The three model code organizations . . . were initially established to enable building officials and their respective jurisdictions to seek solutions to common problems and to satisfy common needs on a

Two sources cast significant light on how late nineteenth century culture viewed sex-separated restrooms. First, the factory toilet laws themselves offer insights into this issue.[41] The second fertile source of such insights are reports prepared by sanitation experts[42] and by state

regional basis."). For purposes of this Article, what is critical is that the first model codes, on their surface directed to technical concerns of safe building construction, contained provisions requiring that public restrooms be separated by sex. *See* INT'L CONF. OF BUILDING OFFICIALS, UNIFORM BUILDING CODE § 1305, at 46 (1927). In particular, the "Requirement for Group H Buildings," (including hotels, apartment houses, dormitories, lodging houses, convents, monasteries, and old people's homes) stated in pertinent part:

> Every building shall be provided with at least one toilet. Every building and each subdivision thereof where both sexes are accommodated shall be provided with at least two toilets located in such building and one toilet shall be conspicuously marked "For Women" and the other conspicuously marked "For Men." Not less than one toilet shall be provided for each fifteen (15) persons or major fraction thereof that such building is designed to accommodate.

Id. §§ 1301, 1305, at 45–46. Every subsequent revision of the Uniform Building Code to the present day contained a similar requirement that public restrooms in new construction be sex-separated. *See, e.g.*, INT'L CONFERENCE OF BLDG. OFFICIALS, UNIF. BUILDING CODE § 1305(c) (1964) ("Sanitation. Every building shall be provided with at least one toilet. Every hotel and each subdivision thereof where both sexes are accommodated shall be provided with at least two toilets located in such building, which shall be conspicuously marked, one for each sex."). The International Building Code, the successor to the Uniform Building Code, provides: "Where plumbing fixture are required, separate facilities shall be provided for each sex." INT'L CODE COUNCIL, INTERNATIONAL BUILDING CODE § 2902.2 (2015).

41. Any suggestion that factory toilet laws were adopted for gender-neutral reasons related to biology is belied by the titles given to many of these laws, which make explicit their paternalistic goals. For example, the 1911 Ohio factory restroom law purported to amend sections of the Ohio General Code "relating to the preservation of the health of female employes [sic]." Act of May 31, 1911, sec. 1, § 1009, 1911 Ohio Laws 488, 488. Similarly, a 1919 North Dakota law related to factory toilets was titled "An Act to Protect the Lives and Health and Morals of Women and Minor Workers." Act of Mar. 6, 1919, ch. 174, 1919 N.D. Laws 317, 317. Other examples can be found in South Dakota and Tennessee legislation. *See* Act of Mar. 3, 1913, ch. 240, 1913 S.D. Sess. Laws 332, 332 ("An Act to Regulate the Employment of Women and Girls and Children Within This State"); Act of Jan. 22, 1897, ch. 98, 1897 Tenn. Pub. Acts 247, 247 ("An Act to require employers of females to provide separate water-closets for them").

42. *See, e.g.*, C. F. W. DOEHRING, U.S. DEP'T OF LABOR, BULL. NO. 44, FACTORY SANITATION AND LABOR PROTECTION 1–2 (1903); *see also* J. J. COSGROVE, FACTORY SANITATION vii (1913) ("The necessity for modern sanitation in the factory does not rest entirely upon the value of sanitation for hygienic reasons, but is made imperative by the fact that money is saved, production cheapened, cost of maintenance lessened, better employees secured, and their efficiencies enhanced, by the proper number and distribution of sanitary appliances."); GEORGE M. PRICE, JOINT BD. OF SANITARY CONTROL IN THE DRESS & WAIST INDUS., SPECIAL REPORT ON SANITARY CONDITIONS IN THE SHOPS OF THE DRESS AND WAIST INDUSTRY 3 (1913) [hereinafter PRICE, SPECIAL REPORT]; PRICE, THE MODERN FACTORY, *supra* note 24, at v ("An attempt is made in this book to give a comprehensive . . . review of the safety and sanitary conditions of factories and workshops . . . and to indicate the methods of safety sanitation, efficiency and welfare of factories and workshops as they should be.").

and federal factory inspectors,[43] all of whom paid special attention to the sanitary conditions facing women and children workers early in the twentieth century.[44]

The North Carolina litigation has focused on multi-user restrooms and the purported threat posed by allowing transpeople to use such spaces based on their gender identities. But as noted above, prior to the 1870s multi-user restrooms did not exist in the United States due to the lack of public works technology.[45] Modern plumbing came late to the workplace, where the single-user indoor water closet or privy, or outdoor outhouse remained the norm until well into the twentieth century.[46] Accordingly, the first factory toilet laws mandating sex-separation applied to single-user water closets, privies, and outhouses.[47] For example, an 1889 California law required that

> [w]henever the persons employed . . . are of different sexes, a sufficient number of separate and distinct water-closets or privies

43. *See, e.g.*, DEP'T OF COMMERCE & LABOR, I REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES IN 19 VOLUMES, S. DOC. NO. 61-645, at 9–10 (1910) [hereinafter CONDITION OF WOMAN AND CHILD WAGE-EARNERS REPORT]; *see also* Kogan, *Sex-Separation*, *supra* note 21, at 37–39 (discussing an investigation of factory sanitation in New York). For example, in 1907, Congress passed "An Act To authorize the Secretary of Commerce and Labor to investigate and report upon the industrial, social, moral, educational, and physical condition of woman and child workers in the United States." Act of Jan. 29, 1907, Pub. L. No. 59-41, 34 Stat. 866, 866. As a result, in 1910, the Department of Commerce and Labor issued an extended study entitled "Report on Condition of Woman and Child Wage-Earners in the United States in 19 Volumes." *See, e.g.*, I CONDITION OF WOMAN AND CHILD WAGE-EARNERS REPORT, *supra*, at 9–10.

44. *See generally, e.g.*, I–XIX CONDITION OF WOMAN AND CHILD WAGE-EARNERS REPORT, *supra* note 43 (documenting the working conditions for women and children within nineteen different industries).

45. *See supra* text accompanying note 21.

46. In his 1914 examination of factory sanitation, *The Modern Factory*, George Price noted the following in a section entitled "Toilet Accommodations":

> No part of an industrial establishment is so neglected as the toilet accommodations. In many cases they are located outside of the factory, and sometimes quite a distance from it, causing the loss of much time and also endangering the health of the employes [sic]. In the investigation made for the New York State Factory Commission, the toilets were located in yards in 186 of the establishments inspected. . . . Many of the toilets were not separated for the sexes and were of an obsolete and crude type.

PRICE, THE MODERN FACTORY, *supra* note 24, at 275.

47. *See id.* at 282–83. Price describes a privy in the following manner:

> In its primitive and common form the privy-vault is nothing but a hole dug in the ground near or at some distance from the house; the hole is but a few feet deep, with a plank or rough seat over it, and an improvised shed over that. . . . The principal parts of a privy are: the shed, the seat, and the receptacle into which the excreta is dropped.

Id. at 282.

> shall be provided for the use of each sex, which shall be plainly so designated and no person shall be allowed to use any water-closet or privy assigned to persons of the other sex.[48]

The requirement that these spaces be "separate and distinct" referred not only to providing separate compartments for men and women, but also requiring that these spaces be located apart from one another in the factory.[49] Where men's and women's water closets could not be physically separated, statutes required that these spaces be properly screened so that the interior could not be observed by those in the adjoining workroom.[50]

Why would states require that single-user restrooms not only be separated by sex, but also be located physically apart from one another in the factory and have their entrances screened? What harm could possibly come from men and women using the same *single-user* water closet, privy, or outhouse?

These requirements reveal late nineteenth century understandings and concerns about female workers, male workers, their bodies, and their relationships. Men used factory water closets for the sole purpose of relieving themselves. In contrast, women needed separate spaces in the workplace—water closets, resting rooms, and dressing rooms—as a result of their inherent weaknesses[51] and their special vulnerabilities

48. Act of Feb. 6, 1889, ch. V, § 1, 1889 Cal. Stat. 3, 3.

49. *See, e.g.*, Act of June 3, 1893, No. 244, § 10, 1893 Pa. Laws, 276, 278 ("A suitable and proper wash and dressing room and water closets shall be provided for females where employed, and the water closets used by females shall not adjoin those used by males, but shall be built entirely away from them and shall be properly screened . . . ."). Factory inspector George Price insisted that adequate partitions between men's and women's restrooms were not enough: "It is best that toilet rooms for males and females should be in different parts of the building." PRICE, THE MODERN FACTORY, *supra* note 24, at 277.

50. *See, e.g.*, Act of Mar. 8, 1913, ch. 83, § 4, 1913 N.C. Sess. Laws. 127, 128 ("[I]n those [water closets] now erected, all closets shall be separated by substantial walls of brick or timber . . . ."); *see also* Act of Apr. 6, 1894, ch. 524, § 1, 1894 Md. Laws 772, 772 (requiring that the two restrooms in public schools have a "separate means of access for each, and unless placed at a remote distance, one from another, the approaches or walks thereto shall be separated by a substantial close fence not less than seven feet high."); *infra* note 53 (documenting lack of adequate barriers and screens separating water closets).

51. *See, e.g.*, DOEHRING, *supra* note 42, at 1–2. A Department of Labor report from 1903 characterized women in the following way:

> Under the influence of long-continued work under insanitary conditions the physiques of the workmen, and especially those employed in factories, often show more or less characteristic marks. The height is usually below medium, the body, weak and thin, is poorly nourished and of sickly paleness. . . . The spiritual and moral life may likewise become inactive and apathetic. . . . Women suffer even more than men from the stress of such circumstances, and more readily degenerate. A woman's body is unable to withstand strains, fatigues, and privations as well as a man's.

(including increased susceptibility to dizziness, fainting, and hysteria).[52] These were spaces to which women could retreat when their weak bodies were overcome by the physical and emotional stresses of the workplace.

The requirement that the water closets be "separate and distinct" and that there be "privacy of approach" responded to the deep-seated concern of Victorian modesty that women not be viewed by men with regard to any aspect of toilet use. First and foremost was the concern that a woman not be seen while using a toilet,[53] or in any state of undress for that matter.[54] The requirement that water closet entrances be screened helped to protect against this breach of privacy.[55] At the same time, concerns of modesty were reciprocal and extended to the impropriety of women viewing factory men in any state of undress.[56]

Id. One book from 1901 compiling the opinions of health experts affirmed these beliefs:

> Where the two sexes are as far as possible equally exposed to the influence of lead, women probably suffer more rapidly, certainly more severely, than men. To a certain extent the reason is to be found in the fact that lead exercises an injurious influence upon the reproductive functions of women. It deranges menstruation.

Id. at 28 (quoting Thomas Oliver, *Lead and Its Compounds*, *in* DANGEROUS TRADES: THE HISTORICAL, SOCIAL, AND LEGAL ASPECTS OF INDUSTRIAL OCCUPATIONS AS AFFECTING HEALTH, BY A NUMBER OF EXPERTS 282, 301 (Thomas Oliver ed., 1902)).

52. *See, e.g.*, PRICE, SPECIAL REPORT, *supra* note 42, at 13. ("In the shops where there are a large number of girls working, it is probable that there are a number likely to have sudden attacks of dizziness, fainting or other symptoms of illness, for whose use provision should be made in the form of rest or emergency rooms."). *See generally* CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT 197–216 (1985) (discussing hysteria as a condition considered to be unique to women in nineteenth century culture).

53. *See, e.g.*, I CONDITION OF WOMAN AND CHILD WAGE-EARNERS REPORT, *supra* note 43, at 371 ("Cotton Textile Industry" report). The inspector noted:

> In a very large proportion of the mills there is not reasonable privacy of approach to the water-closets. In some cases the water closets for females immediately adjoin those for males. In some mills . . . closets are built within the workrooms, and the thin board partitions do not extend to the ceiling, and in some instances the doors do not reason to the floors. *Where this is the case the feet and lower parts of the skirts of females occupying the water-closets can be seen from the workrooms.*

Id. (emphasis added).

54. *See, e.g.*, III *id.* at 344 ("Glass Industry" report). One factory inspector recounted: "Women employed in . . . factories [with inadequate facilities] had for washing purposes at best only the common factory hydrants, and such dressing as they could decently do had to be done in the publicity of rooms in which men were employed or to which men had frequent access." *Id.*

55. *See, e.g.*, XI *id.* at 26 ("Metal Trades" report) ("The sharpest criticism which can be directed against these provisions is the neglect of proper privacy. In a few cases it was possible to see the interior from a point in the shop.").

56. *See, e.g.*, XII *id.* at 12 ("Employment of Women in Laundries" report). The inspector noted:

But the requirement that men's and women's water closets be located apart from one another in the factory responded to a concern that women not even be observed by men when they were entering a toilet room.[57] In addition, locating men's water closets apart from women's water closets assured that men not experience the sounds and smells produced by a woman while using a facility—yet another breach of Victorian modesty.[58]

The anxiety over separate toilets was symbolic of a broader anxiety over men and women even working together in the same space, concerns linked to Victorian morality. One factory inspector noted:

> In one instance the one closet of the establishment was in the basement under the pavement, with no light except what came from a circular piece of glass set in the pavement and no ventilation but the open door. . . . It was in plain sight of the men who were doing the washing in the basement, clad only in their undergarments.

Id.

57. *See, e.g.*, III *id.* at 353 ("Glass Industry" report). The report noted:

> The subject of privacy of closets is, indeed, one to which very few manufacturers have given any thought or, at least, active attention. . . . Often one or two large working rooms represent a whole floor of the building. In such case, there being no other available space on the floor, the closets are often simply walled-off portions of the workroom, the men's and women's closets side by side and the entrances exposed to the direct view of all.

Id.; *see also* I *id.* at 373 ("Cotton Textile Industry" report). The inspector reported:

> In the second and third stories there is a screen in front of the doors to the closets. The wooden partition between the closets extends out beyond the main wall about 2 feet to meet the screen. These little approaches can be seen from any point in each story, and on the first floor there is no screen at all. The approaches are absolutely devoid of privacy.

Id. Similarly, in the silk industry report, the inspector notes: "As a rule there is not sufficient privacy of approach. In most cases the toilets for males adjoin those for females." IV *id.* at 182 ("The Silk Industry" report).

58. *See, e.g.*, COSGROVE, *supra* note 42, at ix. In a caption beneath a photograph of two adjacent, extremely filthy water closets labeled "Men" and "Females" located in the corner of a workroom, Cosgrove notes:

> Moral decency requires that where males and females are employed, separate accommodations shall be provided which, in every sense of the word, will be private. Ignoring the obvious filth of this double accommodation for "men" and "females," close proximity of the fixtures separated only by a thin board partition, far from sound proof, and the common approach, such accommodations would be morally objectionable even if they were sanitary, clean, well lighted and well ventilated.

Id.; *see also* I CONDITION OF WOMAN AND CHILD WAGE-EARNERS REPORT, *supra* note 43, at 373 ("Cotton Textile Industry" report) ("On each floor one water-closet for men and one for women were found. They are separated by a board partition, not impervious to light and certainly not to sound, since there is an opening near the top of the partition.").

> In cotton mills large numbers of men, women, and children are brought together in the same workrooms. Where men and women are thus constantly associated it is, of course, possible for immoral relations between them to spring up. . . . In many mills . . . there is no privacy of approach to the toilets, and anyone entering them does so in full view of persons of both sexes in the same workroom, a condition obviously not in the interest of good morals.[59]

To late nineteenth century regulators, providing separate water closets was directly related to upholding social morality.

In providing vulnerable women and girls with a separate restroom space, regulators sought to protect them from the perceived threat posed by men and boys working in factories, who were portrayed as leering and predatory, ever seeking to observe women in any state of undress, excited not only by viewing a woman's legs under a toilet stall, but also by even watching a woman enter a water closet.[60] In effect, factory toilet laws reflect this prevailing view of male factory workers as vulgar and obscene.[61]

The sex-segregated public restroom, first mandated by laws in the late nineteenth century, has become a pervasive architectural feature of contemporary America. Yet that space continues to convey cultural messages first evoked by factory laws in the late nineteenth century. Perhaps most importantly, this architectural feature continues to reinforce the cultural understanding that the sex of human bodies is inherently binary—every person is either male or female.[62] There is no better evidence of this than the ubiquitous men's and women's signs on the doors of public restrooms.

59. *See* I *id.* at 590.

60. *See, e.g.*, III *id.* at 455 ("Glass Industry" report). In the 1903 Department of Labor report, the inspector interviewed managers about their women employees:

> One superintendent expressed the opinion that [a glass factory] is no fit place for a woman to work. He said that he has, in his experience, discharged more men for offering insults to women than for any other cause. . . . An establishment rule prohibits the men lounging in or about the women's workrooms during the noon hour . . . .

Id.

61. *See, e.g.*, Act of May 18, 1892, ch. 673, § 9, 1892 N.Y. Laws 1372, 1376 (requiring that water closets must "be kept free of obscene writing and marking").

62. *See, e.g.*, Browne, *supra* note 10, at 338 ("The physical sexed segregation of bathrooms reproduces the illusion of a natural, biological binary separation of sex and physically (re)places bodies within dichotomous sexes ordering these sites.").

II. PUBLIC RESTROOMS AND THE RIGHTS OF TRANSGENDER PEOPLE

One of the core questions raised in the North Carolina litigation is the meaning that is to be accorded to the term "sex" for purposes of Title VII[63] and Title IX[64] and its implementing regulations.[65] In its complaint, the Obama DOJ asserted that sex equates to gender identity and, accordingly, that transgender persons be permitted to access public restroom in accord with that identity.[66] In contrast, in line with H.B. 2, the State plaintiffs argued that sex equates to biology and, accordingly, that such access should be based on a person's "current anatomy."[67]

In crafting their opposing litigation strategies, all parties to the litigation in North Carolina federal court accepted the existing architectural configuration of the sex-separated public restroom as a given. The major difference between the parties' approaches to this space was that, in endeavoring to protect transgender rights, the Obama DOJ consciously ignored the century-old cultural understandings surrounding the sex-separated restroom that viewed women as weak and vulnerable, and men as inherently predatory.[68] In great contrast, the

63. 42 U.S.C. § 2000e-2 (2012).

64. Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2012).

65. 28 C.F.R. §§ 54.500, 54.535 (2016); 34 C.F.R. §§ 106.32–.34, 106.41(b) (2016). The Obama DOJ similarly alleged that H.B. 2 violated the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13), by engaging in discrimination on the basis of sex and gender identity in programs receiving federal funds, Obama DOJ Complaint, *supra* note 1, ¶ 2, at 1–2. In addition to alleging similar claims under Title VII and Title IX, Carcaño Complaint, *supra* note 1, ¶¶ 180–93, at 41–43, the transgender plaintiffs and civil rights groups have also claimed that H.B. 2 violated the constitutional rights of transpeople under the equal protection clause and the due process clause of the Fourteenth Amendment, *id.* ¶¶ 132–79, at 33–41. This Article solely focuses on the statutory claims under Title VII and Title IX.

66. Obama DOJ Complaint, *supra* note 1, ¶ 28, at 6–7.

67. Berger Complaint, *supra* note 1, ¶ 5, at 3.

68. The Obama DOJ did accept certain of the nineteenth century understandings of the sex-separated restroom concerning the need for privacy. In his Memorandum Opinion granting a preliminary injunction to the transgender plaintiffs, the federal district court judge stated:

> Plaintiffs acknowledge, as Defendants contend, that such segregation promotes privacy and serves important government interests, particularly with regard to minors. Arguably, segregating such facilities on the basis of sex fills gaps not addressed by the peeping and indecent exposure statutes—for example, a situation in which a man might inadvertently expose himself to another while using a facility that is not partitioned. It is also possible that sex-segregated facilities protect against embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one's body is subject to view.

Carcaño v. McCrory, 201 F. Supp. 3d 615, 623 (M.D.N.C. 2016) (order granting a preliminary injunction).

State plaintiffs fully embraced those understandings to construct an elaborate Victorian melodrama, one in which the evil villain is "Transwoman"—actually a man posing as a woman—who seeks to enter the ladies' restroom with the nefarious goal of attacking weak and vulnerable women and girls. The hero of the drama is the North Carolina General Assembly, brandishing H.B. 2, who appears at the last minute to foil the wicked plot of Transwoman and his co-conspirator, the Obama DOJ.[69]

This Article seeks to explore how, in their acceptance of the sex-separated restroom as an unchallenged fact, the parties were unaware of the role that this architectural space has played and continues to play in the very cultural construction of bodies, genders, and sexualities.[70] In particular, accepting the conventional division of public restrooms into men's and women's led the parties to distort transgender identity, albeit in very different ways.[71] To explore these issues, this Article focuses on the complaints filed in federal court in North Carolina.[72]

All parties to the litigation were faced with a fundamental challenge. When the cultural understandings surrounding the sex-segregated public restroom developed at the end of the nineteenth century, transgender individuals were not part of the public narrative.[73] Accordingly, conventional understandings about public restrooms inherited from that era are devoid of any awareness of transpeople. In particular, the rigid division of human sex into the binary "male" and

69. *See infra* Section II.C.

70. Cultural geographer Robyn Longhurst notes:

> [T]here is no one body; *the* body is an illusion. There are only bodies in the plural. There are complex processes through which female and male bodies are differentiated. Bodies are *sexed* and gendered. The multiplicity that surrounds and inhabits the body, or bod*ies*, makes it impossible to settle on any one straightforward definition. The body—whether it be infant, child or adult—is a surface of social and cultural inscription; it houses subjectivity; it is a site of pleasure and pain; it is public and private; it has a permeable boundary that is crossed by fluids; it is material, discursive and psychical.

Robyn Longhurst, *The Body*, *in* CULTURAL GEOGRAPHY: A CRITICAL DICTIONARY OF KEY CONCEPTS 91, 91 (David Atkinson et al. eds., 2007).

71. Others have explored how public restrooms effectively make outlaws of gender non-conforming people, including transgender individuals, whose self-identities and public expressions of those identities do not fit neatly into the categories male and female. *See, e.g.*, Browne, *supra* note 10, at 338, 343.

72. *See* discussion *supra* note 1.

73. SUSAN STRYKER, TRANSGENDER HISTORY 34 (2008). Susan Stryker traces the roots of the modern transgender rights movement to the mid-nineteenth century, but points out that "the distinctions between what we now call 'transgender' and 'gay' or 'lesbian' were not always as meaningful back then as they have since become." *Id.*

"female" categories cannot begin to account for the diversity of transgender identity.

A. Transgender Identity Is Not Binary in Nature

Transgender identity is not binary. Early understandings did adopt such a view, considering a transperson as either "a man trapped in a woman's body" or a "woman trapped in a man's body" and often referring to such individuals as "transsexuals" who suffered from a mental illness, "gender identity disorder."[74] The cure for this "disorder" was sex reassignment surgery, altering external genitals and/or internal gonads to match the individual's sense of gender identity.[75]

For roughly the past decade, psychologists and other scholars have begun paying closer attention to the narratives of transgender people, and have realized that the tapestry of trans-identity is far richer than merely binary.[76] Many transgender individuals do self-identify with the sex opposite that of their birth bodies. Others do not self-identify as either male or female, but in some other way entirely.[77] Moreover, the

74. *See* JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 138–39 (2002) (stating that transsexuals "spoke of 'a female trapped in a male's body' "). The term "gender identity disorder" was first coined in the American Psychological Association's DSM-III in 1980. Peggy T. Cohen-Kettenis & Friedemann Pfäfflin, *The DSM Diagnostic Criteria for Gender Identity Disorder in Adolescents and Adults*, 39 ARCHIVES SEXUAL BEHAV. 499, 499 (2009).

75. *See* STRYKER, *supra* note 73, at 91–98.

76. *See, e.g.*, Lisa M. Diamond, Seth T. Pardo & Molly R. Butterworth, *Transgender Experience and Identity*, *in* 2 HANDBOOK OF IDENTITY THEORY AND RESEARCH 629 (Seth J. Schwartz et al. eds., 2011) ("[T]here is increasing evidence that . . . dichotomous models of gender fail to accommodate the true complexity and diversity of transgender experience."). The authors explain:

> [T]he vast range of transgender-identified individuals who claim that they are "both" or "neither" male/female, or who adopt complex constellations of male/female identification and presentation, are not considered by the medical community to be appropriate candidates for sex reassignment. In fact, many such individuals do not seek complete sex reassignment at all, preferring instead to modify selected parts of their body (such as breasts or facial hair) or to forgo physical change altogether and focus on modifications in their social status and legal standing. This is consistent with the fact that such individuals typically reject the notion that they are simply "trapped in the wrong body" and hence do not view a wholesale substitution of one gender identification for the other as a personal goal or as a potential solution to any experiences of distress or discomfort they might face. It is this group of gender-fluid individuals that poses a fundamental dilemma to our attempts to develop broad-based models of transgender identity development.

Id. at 632.

77. *See, e.g.*, Katrina Roen, *"Either/Or" and "Both/Neither": Discursive Tensions in Transgender Politics*, 27 SIGNS 501, 502 (2002) ("[S]ubversive crossing, public and politically strategic transgendering, is seen as one step on the road toward gender transgression, gender transcendence, and (ultimately) ridding the world of 'gender oppression.' For some, this

latest volume of the Diagnostic and Statistical Manual of Mental Disorders ("DSM")[78] replaces "Gender Identity Disorder" with a new psychological category, "Gender Dysphoria," that applies only to those who experience suffering as a result of their gender disparity.[79] In other words, trans-identity is, in and of itself, no longer a "disorder."[80]

Under the Obama administration, at least one federal agency embraced this contemporary understanding of trans-identity. In May 2015, the Job Corps issued a directive entitled "Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program," the purpose of which was to "ensure equal access and opportunity for transgender applicants and students in the Job Corps program."[81] The document sets forth a series of definitions, including the following:

> "Transgender" refers to people whose gender identity, expression, or behavior is different from that typically associated with their assigned sex at birth. Transgender is a broad term and an acceptable descriptive term for non-transgender people to use. . . .

necessarily entails the disruption and eventual abandonment of categories such as 'woman,' 'man,' and 'transsexual.' " (citation omitted)).

78. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xli (5th ed. 2013); The DSM, published by the American Psychiatric Association, is the handbook used by health care professionals as the authoritative guide to the diagnosis of mental disorders. Now in its fifth edition, the DSM-V contains descriptions, symptoms, and other criteria for diagnosing mental disorders. *See id.*

79. *Id.* at 451; AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 2 (2013) [hereinafter AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA], https://psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/WN4F-CFU8].

80. AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA, *supra* note 79, at 2. With respect to the term "Gender Dysphoria" in the DSM-5, the American Psychiatric Association states: "Part of removing stigma is about choosing the right words. Replacing 'disorder' with 'dysphoria' in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is 'disordered.' " *Id.*

81. Memorandum from Lenita Jacobs-Simmons, U.S. Dep't of Labor, Directive: Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program 1 (2015) [hereinafter Job Corps Directive] ("The Job Corps National Office, in consultation with the Civil Rights Center of the Department of Labor, has developed this guidance to ensure equal access and opportunity for transgender applicants and students in the Job Corps program."). The Obama DOJ was clearly aware of this document. A DOJ and ED directive concerning transgender students in public schools relies on the Job Corps document to support the following statement: "[A] school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments' interpretation is consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination." Opinion Letter on Transgender Students, *supra* note 3, at 2.

> "Gender identity" refers to an individual's internal sense of being male, female, *or something else*. Since gender identity is internal, one's gender identity is not necessarily visible to others.[82]

Although the document also defines the terms "Transgender Man" and "Transgender Women," the Job Corps' definitions clearly embrace a view of gender identity (and, by extension, transgender identity) that is not limited to male and female; rather, this view allows for an individual's self-understanding to move beyond the binary, as illustrated by the language "or something else."[83] In addition, in a section entitled "Housing, Restroom and Shower Access," the directive states:

> The primary and overriding factor in assigning housing should be the student's gender identity. . . .
>
> When a transgender student identifies as a particular gender, dormitory assignments should be based on that gender, regardless of whether the student has had any gender-related surgery, hormone therapy, or other medical procedures.
>
> . . . For transgender students *who do not identify as male or female*, again, the housing preference of the student should be discussed and respected, whenever possible.[84]

Unfortunately, the colossal presence of the sex-separated restroom looming over the North Carolina litigation left the Obama DOJ with little choice but to adopt a narrower, binary vision of trans-identity. Like everyone else, a transperson must be either male or female.

B. The U.S. Department of Justice's Vision of Restrooms and Transgender Identity Under the Obama Administration

By any account, the Obama administration's insistence that gender identity should be the primary criterion for determining who can use which public restroom was bold.[85] The Obama DOJ's refusal to pay homage to the social history and conventional norms surrounding the public restroom is strong evidence of its commitment to the rights of transpeople.[86] Nonetheless, the Obama DOJ's unquestioning acceptance

82. Job Corps Directive, *supra* note 81, at 1–2 (emphasis added).

83. *Id.* at 2.

84. *Id.* at 3–4 (emphasis added).

85. *See supra* note 3 and accompanying text.

86. *See supra* Section I.A. Though accepting that, in general, people desire privacy in using restroom facilities, the Obama DOJ rejected the nineteenth century gendered vision that such privacy was necessary to protect women and girls from men. Loretta E. Lynch, Att'y General, U.S. Dep't of Justice, Remarks at Press Conference Announcing Complaint Against

of the longstanding architectural division of public restrooms into two, sex-separated spaces led it to distort current understandings of trans-identity, thereby leaving groups of transpeople unprotected.[87]

The North Carolina federal litigation was triggered by letters the Obama DOJ's Civil Rights Division sent to former Governor Pat McCrory and other officials asserting that North Carolina's H.B. 2 violated Title VII,[88] Title IX and its implementing regulations,[89] and the Violence Against Women Reauthorization Act of 2013 ("VAWA").[90] One such letter stated:

> H.B. 2 . . . is facially discriminatory against transgender employees on the basis of sex because it treats transgender employees, whose gender identity does not match their "biological sex," as defined by H.B. 2, differently from similarly situated non-transgender employees. Under H.B. 2, non-transgender state employees may access restrooms and changing facilities that are consistent with their gender identity in public buildings, while transgender state employees may not.[91]

The Obama DOJ's unwavering support for transgender people was illustrated by its insistence that gender identity and not birth sex be the basis for determining who can access which public restroom. The Department seemingly disregarded the nineteenth-century cultural

the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint [https://perma.cc/4Z62-CYBW] ("This is why none of us can stand by when a state enters the business of legislating identity and insists that a person pretend to be something they are not, or invents a problem that doesn't exist as a pretext for discrimination and harassment."). Rather, in the joint guidance document issued in May 2016, the DOJ and ED recognized that *any* student might want added privacy: "A school may, however, make individual-user options available to all students who voluntarily seek additional privacy." U.S. Dep't of Educ. & U.S. Dep't of Justice, *supra* note at 3, at 3. In other words, rather than force only transgender students to use a private, single-user restroom, the DOJ took the position that private facilities should be provided to anyone who might so desire.

87. *See infra* text accompanying note 101.

88. 42 U.S.C. §§ 2000e to 2000e-8 (2012).

89. 20 U.S.C. § 1681; *e.g.*, 34 C.F.R. pt. 106 (2016).

90. 42 U.S.C. § 13925(b)(13); U.S. Dep't of Justice, Civil Rights Division, Opinion Letter to Governor Pat McCrory 1 (May 4, 2016) [hereinafter U.S. Dep't of Justice, McCrory Opinion Letter] (alleging violations of Title VII by Governor McCrory and state of North Carolina); U.S. Dep't of Justice, Civil Rights Division, Opinion Letter on North Carolina House Bill 2 to Frank L. Perry, N.C. Sec'y of Pub. Safety, 1 (May 4, 2016) (alleging violations of Title VII and VAWA by the North Carolina Department of Public Safety); U.S. Dep't of Justice, Civil Rights Division, Opinion Letter on North Carolina House Bill 2 to Margaret Spellings, President, Univ. of N.C., et al. 1 (May 4, 2016) (alleging violations of Title VII, Title IX, and VAWA by the University of North Carolina system).

91. U.S. Dep't of Justice, McCrory Opinion Letter, *supra* note 90, at 2.

history surrounding that space that portrayed women as weak, vulnerable, and in need of protection from predatory, leering, and vulgar men.[92]

The problem is that the Obama DOJ's position literally runs up against a brick wall—the wall separating the men's restroom from the women's restroom. This ubiquitous architectural feature forced the DOJ to adopt a binary vision of transgender identity. For transpeople who do not identify as male or female, there *is* no restroom that is "consistent with their gender identity."[93] This distorting of trans-identity to comport with the built environment becomes clear in the DOJ's complaint challenging H.B. 2's mandate that all "[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals based on their biological sex."[94] The complaint relies heavily on Title IX, a statute that makes no reference to restrooms.[95] However, the ED's regulations adopted in 1980 implementing Title IX state: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[96]

In adopting this regulation, the ED was likely well aware of the role that public restrooms had played in defeating the Equal Rights Amendment ("ERA").[97] In light of the current federal court controversy, it is ironic that North Carolina Senator Sam Ervin invoked the specter of unisex restrooms to oppose the ERA in 1972. In congressional debate, after citing North Carolina's law requiring "separate and distinct toilet rooms[,]"[98] Senator Ervin stated:

92. *See supra* text accompanying note 60.

93. *Id.*

94. Obama DOJ Complaint, *supra* note 1, ¶ 12, at 4; *see id.* ¶ 2, at 1–2 (expanding the basis for the action to include not only Title VII, but also Title IX and the Violence Against Women Reauthorization Act).

95. *See id.* ¶¶ 21, 55, at 5, 12 (respectively). Title IX provides in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012).

96. 34 C.F.R. § 106.33 (2016) (originally adopted in 45 Fed. Reg. 30,955, 30,960 (May 9, 1980)).

97. *See* H.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972); Amanda Terkel, *Bathroom Panic Has Long Stood in the Way of Equal Rights*, HUFFINGTON POST (Mar. 24, 2016, 2:45 PM), http://www.huffingtonpost.com/entry/bathroom-panic_us_56f40300e4b0c3ef521820e3 [https://perma.cc/DX89-BYN3] (" 'Operation Wake Up,' a coalition of groups opposed to the ERA, also pushed the bathroom issue. An activist dressed up as a 'common toilet' and crossed out the words 'his' and 'hers' and wrote 'theirs.' ").

98. Act of Mar. 8, 1913, ch. 83, § 1, 1913 N.C. Sess. Laws. 127, 127.

> The question raised by this amendment is what will be the effect of the Equal Rights amendments on laws which establish privacy of this nature and which require that the sexes be separated in restrooms. . . .
>
> It is clear as the noonday sun in a cloudless sky that the only reason that this Nation has separate restrooms for men and women and boys and girls . . . is sex. Consequently, being a distinction based on sex, the equal rights amendment would abolish the power of the Federal Government and the power of the 50 States to require separate facilities of this nature for persons of different sexes.[99]

In adopting the separate toilets regulation implementing Title IX, the ED may well have sought to sidestep the very controversy that doomed the ERA less than a decade earlier.

Nonetheless, the ED's regulations accepting the propriety of separating restrooms by sex straitjacketed the Obama DOJ's approach to the North Carolina litigation, which was aimed at protecting all transgender people. The 1980 regulation effectively left the DOJ with little choice but to construct trans-identity as binary, thereby ignoring the growing number of transpeople who self-identity in some other way.[100] This is directly reflected in the DOJ's complaint. In attacking H.B. 2, the department set forth its assertion that gender identity should be the primary factor in determining a person's sex, not external genitals:

> An individual's "sex" consists of multiple factors, which may not always be in alignment. Among those factors are hormones, external genitalia, internal reproductive organs, chromosomes, and gender identity, *which is an individual's internal sense of being male or female.* For individuals who have aspects of their sex that are not in alignment, the person's gender identity is the primary factor in terms of establishing that person's sex. External genitalia are, therefore, but one component of sex and not always determinative of a person's sex.[101]

Despite the boldness of its position, like the ED, the Obama DOJ accepted that gender identity is binary, the "internal sense of being male or female." The DOJ then aligned the definition of trans-identity with that understanding: "Transgender individuals are individuals who have a gender identity that does not match the sex they were assigned at birth.

99. 92 CONG. REC. 9529–30 (1972) (statement of Sen. Ervin).
100. *See* 34 C.F.R. § 106.33.
101. Obama DOJ Complaint, *supra* note 1, ¶¶ 31–32, at 7. (emphasis added).

A transgender man's sex is male and a transgender woman's sex is female."[102]

Locked in by the architectural fact of sex-separated restrooms, the Obama DOJ appears to have done its best to defend the rights of transgender people. But in the end, the existing binary configuration of that space and the public anxiety surrounding that space forced the DOJ to accept a narrow vision of transgender identity.[103] Nonetheless, there is no hint in the DOJ's complaint or in any other filing in the litigation that the architectural configuration of the sex-separated public restroom might be the true culprit responsible for denying civil rights to transgender people.

C. The Defendant's Vision of Restrooms and Identity—A Victorian Melodrama

Like the Obama DOJ, the leaders of both chambers of the North Carolina General Assembly accept as a given the existing configuration of sex-separated public restrooms in their complaint.[104] But in great contrast to the DOJ, in crafting their litigation position the State plaintiffs fully embraced the late nineteenth century cultural understandings of that space, understandings that developed long before our society gained any awareness of transgender people.

In reliance on that cultural history, the State plaintiffs constructed a dramatic Victorian melodrama in which the transwoman plays the central role as the evil villain. In the weeks leading up to the lawsuit, North Carolina officials left no doubt that they adopted a late nineteenth century vision of public restrooms, one involving vulnerable women and predatory men. Senate President Pro Tempore Phil Berger described the legislature's purpose in enacting H.B. 2 as "stop[ping] a radical . . . ordinance allowing men into public bathrooms and locker rooms with young girls and women."[105] He described the Charlotte ordinance overturned by H.B. 2 as "dangerous . . . creat[ing] a loophole that any man with nefarious motives could use to prey on women and young children."[106]

102. *Id.* ¶ 34, at 8.

103. This did not prove to be a problem for the ACLU in representing the transgender plaintiffs in the North Carolina litigation, as both plaintiffs self-identified as male. *See* ACLU Complaint, *supra* note 65, ¶ 22, at 8 ("Mr. Carcaño is a man.") and ¶ 58, at 15 ("Mr. McGarry is a man.").

104. The focus of this Section is the complaint filed in *Berger*. *See* Berger Complaint, *supra* note 1.

105. Obama DOJ Complaint, *supra* note 1, ¶ 18, at 5.

106. *Id.*

Here is the outline of an imaginary plot for the Victorian melodrama embodied in the Berger Complaint:

- For as long as anyone could remember, things were peaceful in the Village. (The "system of single-sex bathrooms . . . has been an accepted part of our Nation's social compact since time out of mind."[107]) In particular, people went about their daily lives, respecting one another's "bodily privacy"[108] by sharing "the intimate settings of public bathrooms, locker rooms, or showers . . . only [with] other people of the same biological sex."[109] In the Village there existed a special fortress, the Women's Restroom, a protected space set aside for the exclusive use of weak and vulnerable women and girls.

- One day a villain named Transwoman, a man dressed in women's clothing, arrived in the Village. A deeply "conflicted"[110] person, Transwoman suffered from the dreaded psychological illness, "gender dysphoria."[111] In part as a result of that illness and in part simply because he was a man, Transwoman was predatory to the core. His sole desire was to invade the Women's Restroom to see women and girls in states of undress,[112] and perhaps to perform other acts of untold evil on these vulnerable souls.

- To accomplish this, Transwoman crafted an evil plot whereby, based "solely on [his] self-declared"[113] and "false claims of gender identity,"[114] he deceitfully asserted that he was a woman and therefore should be permitted to enter the Women's Restroom.[115] Transwoman's plot would enable him as a "male sexual predator [to] falsely claim[] to 'identify' as

107. Berger Complaint, *supra* note 1, ¶ 9, at 4.

108. *Id.* ¶ 1, at 1.

109. *Id.*

110. *Id.* ¶ 3, at 2 ("Apparently, the Department believes that these obvious social costs are outweighed by the policy's purported psychological benefits to persons of conflicted gender identity.").

111. *Id.* ¶ 3, at 2.

112. According to the ACLU, in enacting H.B. 2 North Carolina "[l]awmakers made no attempt to cloak their actions in a veneer of neutrality, instead openly and virulently attacking transgender people, who were falsely portrayed as predatory and dangerous to others." Carcaño Complaint, *supra* note 1, ¶ 3, at 2.

113. Berger Complaint, *supra* note 1, ¶ 3, at 2.

114. *Id.* ¶ 88, at 29.

115. By failing to distinguish between transwomen and sexual predators, the State plaintiffs suggest that transwomen are deceitful by nature. *See, e.g.*, *id.* ¶ 62, at 18 ("Indeed, under the Department's legal theory, a biological male found in a women's restroom has a legal right to be there if he merely *claims* to 'self-identify' as female.").

female so that he can enter a women's bathroom and prey upon a little girl whom he has seen enter alone."[116]

- The Village people were outraged, fearing that Transwoman's evil scheme would prohibit them from "exclud[ing] biological males from female bath and shower facilities,"[117] and would inevitably lead to "partially or fully unclothed women and girls coming into close proximity and visual contact with individuals who . . . display male sex organs."[118]

- Coming to the aid of the damsels in distress, the heroic Town leaders unsheathed their shining weapon, H.B. 2, a statute aimed at protecting women and girls from an "assault on *their* dignity, privacy, and safety."[119] Specifically, H.B. 2 required that any "facility [such as the Village's Women's Restroom] . . . where persons may be in various states of undress in the presence of other persons"[120] must be "designated for and only used by persons based on their biological sex."[121]

- The Town leaders explained that the goal of H.B. 2 was to show "concern and compassion for . . . girls and women . . . who do not wish to be in close proximity to persons with genitals characteristic of the opposite sex when using public restrooms, locker rooms, and showers."[122]

- Out of further compassion, the Town leaders included an "accommodation"[123] in H.B. 2 that allowed Transwoman, based on the "special circumstance[]"[124] of his psychological illness, to enter a "single-occupancy bathroom" meant for townspeople with disabilities (*if* one happened to be

116. *Id.* ¶ 88, at 29; *see also id.* ¶ 62, at 17–18 ("Such a policy would also create an opportunity for sexual predators of any sexual orientation to abuse the policy to facilitate their predation. And in so doing, such a policy would violate settled, legitimate expectations of privacy and safety that have long prevailed in the State.").

117. *Id.* ¶ 64, at 18.

118. *Id.* ¶ 61, at 17; *see also id.* ¶ 3, at 2 ("Never mind that the Department's policy will inevitably lead to women and girls in public changing facilities encountering individuals who, whatever their gender identity, still have fully functional male genitals."). The reference to "functional" male genitals suggests that, so long as a transwoman has male genitals, "he" is a sexual threat to women and girls.

119. *Id.* ¶ 5, at 3.

120. *Id.* ¶ 24, at 8.

121. *Id.* ¶ 22, at 8.

122. *Id.* ¶ 5, at 3.

123. *Id.* ¶ 28, at 9.

124. *Id.* ¶ 27, at 8.

> available).[125] In addition, the Town leaders compassionately told Transwoman that if he merely removed his manhood through "a sex-change operation . . . then [he?/she? could] use the public facilities consistent with [his?/her?] new anatomy."[126]
>
> - But evil Transwoman refused to sit idly by and allow the Town leaders to stifle his predatory desire to invade the Women's Restroom. He engaged the assistance of a supervillain, the Obama DOJ, to stage an all-out "assault . . . on the sovereign right of [the town] to determine [its] own policies regarding public bath and shower facilities."[127]
>
> - Joining in Transwoman's rallying cry that all people "be permitted 'to access bathrooms and other facilities consistent with their 'gender identity,' "[128] the DOJ threatened to hold hostage "hundreds of millions of dollars,"[129] that the town "citizens ha[d] already paid"[130] to the DOJ's boss.

As this exercise makes clear, the State plaintiffs' only concern was with inauthentic transwomen who, in their view, are actually men.[131] Transmen (arguably really women who are a threat to men when they enter the men's restroom) are nowhere to be found in their complaint. In the late nineteenth century factory, no one was thinking about aggressive women seeking to assault men or boys, visually or otherwise. Accordingly, there is simply no cultural history related to women being a threat to men in public restrooms upon which the State plaintiffs could rely in crafting their lawsuit.

In sum, by dismissing gender identity as of any relevance whatsoever to public restroom use, the State plaintiffs ignore a fundamental truth about transgender lives. Moreover, the suggestion that transwomen are a threat to women and girls in public restrooms is a red herring unsupported by evidence. In fact, all credible surveys reveal

125. *Id.* ¶ 26, at 8.
126. *Id.* ¶ 4, at 3.
127. *Id.* ¶ 8, at 4.
128. *Id.* ¶ 37, at 11.
129. *Id.* ¶ 59, at 16.
130. *Id.* ¶ 60, at 17 ("[T]he Department's demands carry a threat to cut off over $100 million in annual federal funding currently provided to the State's Department of Public Safety. Here again, these are funds that North Carolina citizens have already paid into the federal treasury in the form of tax payments.").
131. *See, e.g.*, *id.* ¶ 8, at 4 ("It is a remarkable act of executive overreach, one that unnecessarily insists on political correctness at the expense of privacy and safety for other vulnerable citizens, especially women and girls.").

that transpeople are common victims of restroom violence, facing constant threats of verbal and physical assault in their attempt to find safe and accessible public restrooms.[132] The remarks of Attorney General Loretta Lynch that accompanied the Obama DOJ's filing of the North Carolina lawsuit make clear that the federal government was well aware of groundless accusations often directed against transpeople:

> [W]e have seen bill after bill in state after state taking aim at the LGBT community. Some of these responses reflect a recognizably human fear of the unknown, and a discomfort with the uncertainty of change. But this is not a time to act out of fear. This is a time to summon our national virtues of inclusivity, diversity, compassion and open-mindedness.[133]

The conflict between the opposing sides to this litigation is a direct consequence of the fact that public restrooms are currently segregated by sex, which requires a society to determine criteria for who is entitled to access which of the two restrooms. Were this most important of public spaces to be configured in a non-binary way, the vitriolic opposition exhibited in the North Carolina litigation would simply collapse.

III. THE ALL-GENDER, MULTI-USER PUBLIC RESTROOM OF THE FUTURE

Perhaps the time has come to reconsider how public restrooms should be architecturally configured and designated. Perhaps the time has come to consider the possibility of an all-gender, multi-user restroom, one in which no one will either feel or be made to feel out of place. Critical to such an endeavor is assuring that the concerns of those opposing the transgender plaintiffs in the North Carolina litigation be taken into account. Any proposed new configuration must protect the privacy, safety, and dignity of *every* person who enters the space. But these concerns can be protected in ways other than by dividing public restrooms into binary spaces, men's and women's.

An important analogy can be drawn to the issue of marriage equality. Prior to the Supreme Court's decision in *Obergefell v.*

132. *See, e.g.*, Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 75 (2013). In a survey of ninety-three respondents in Washington, D.C., 58% of the respondents reported that they "avoided going out in public due to a lack of safe restroom facilities," *id.* at 76, 68% reported that they had been verbally harassed in a restroom, and 9% reported that they had been physically assaulted in a restroom, *id.* at 71; *see also id.* at 67 (documenting previous qualitative studies in this area).

133. Lynch, *supra* note 86.

Hodges,[134] courts devoted considerable attention to determining the sex of a transperson for the purpose of state laws mandating opposite sex marriage.[135] After the Court concluded that the Constitution requires marriage equality,[136] the need to determine anyone's sex for marriage purposes evaporated. Similarly, were multi-user public restrooms in the future to become all-gender, the central question raised in the North Carolina litigation as to whether gender identity or birth certificate sex should be the criterion for restroom usage would evaporate.

Recent developments with respect to all-gender restrooms are encouraging. On September 29, 2016, California Governor Jerry Brown signed into law legislation that requires all single-user restrooms in California to be designated "all-gender."[137] That law states in pertinent part: "All single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency shall be identified as all-gender toilet facilities . . . ."[138] Similar legislation has also been adopted by Philadelphia and Seattle,[139] among other cities, as well as by various universities.[140]

In another development receiving less attention, the International Code Council ("ICC") amended the International Plumbing Code in 2015 to require that single-user toilet facilities no longer be designated

134. 135 S. Ct. 2584 (2015).

135. *See, e.g.*, *In re* Gardiner, 42 P.3d 120, 122–26 (Kan. 2002); M. T. v. J. T., 355 A.2d 204, 205–07 (N.J. Super. Ct. App. Div. 1976); Littleton v. Prange. 9 S.W.3d 223, 223–27 (Tex. Ct. App. 1999).

136. *Obergefell*, 135 S. Ct. at 2602–03. ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.").

137. A.B. No. 1732, ch. 818, Gen. Assemb., Reg. Sess. § 1 (C.A. 2016).

138. *Id.*

139. PHILA., PA., EXISTING BUILDING CODE § 9-636(2) (Am. Legal Publ'g Corp. through Feb. 8, 2017) ("Any entity that owns or leases a structure open to the general public, including but not limited to Retail Establishments and City-owned buildings, that currently has or at any time establishes one or more single-occupancy bathroom facilities for public use, shall provide Gender-neutral Signage for such facilities."); SEATTLE, WA., MUN. CODE §§ 14.07.010–.040 (Mun. Code Corp. through Feb. 17, 2017); *see* Phila., Pa., Ordinance 150668 (Oct. 20, 2015); Phila., Pa., Ordinance 150668 (Oct. 20, 2015); Seattle, Wa., Ordinance 124929 (Aug. 14, 2015).

140. *See, e.g.*, La. State Univ. Student Senate, Resolution 15 (Oct. 2015); *see also* Bamzi Banchiri, *Yale OKs Gender-Neutral Bathrooms, Joining 150+ College Trend*, CHRISTIAN SCI. MONITOR (May 21, 2016), http://www.csmonitor.com/USA/Education/2016/0521/Yale-OKs-gender-neutral-bathrooms-joining-150-college-trend [https://perma.cc/C39M-M4RN]; Katy Steinmetz, *The Gender-Neutral Bathroom Revolution Is Growing*, TIME (Jan. 11, 2016), http://time.com/4175774/san-francisco-gender-neutral-bathrooms/ [https://perma.cc/9DLF-9VEC] (noting that other places such as Washington, D.C.; Austin, Texas; and West Hollywood, California, have adopted similar measures, along with over 150 colleges and universities in the United States).

by gender markers.[141] The amendment states in pertinent part: "Single-user toilet facilities and bathing rooms, and family or assisted-use toilet and bathing rooms shall be identified for use by either sex."[142]

Despite language that arguably adopts a binary vision of sex ("either sex"), the commentary accompanying this amendment makes clear that it was meant to take into account the needs of transgender people: "The same number of fixtures are provided and waiting can be reduced by allowing either sex to use the toilet room. This will also addresses the concerns regarding transgender individuals . . . ."[143]

This amendment will take effect in 2018.[144] Its importance cannot be understated. The International Plumbing Code is the model code that virtually every municipality in the United States adopts to govern building construction.[145] Accordingly, as localities choose to update their building codes to take account of this ICC amendment, the single-user, all-gender public restroom will become commonplace across America.

But, of course, multi-user and not single-user public restrooms are at the heart of the North Carolina controversy. In fact, scholars have also begun thinking about new ways to reconfigure multi-user public restrooms to take into account the needs of all people for safe and accessible restrooms that protect individual privacy. In the book *Toilet: Public Restrooms and the Politics of Sharing*, Harvey Molotch, professor in the Department of Sociology and the Department of Social and Cultural Analysis at New York University ("NYU"), recounts the failed

141. INT'L CODE COUNCIL, P40-15, 2015 GROUP A PUBLIC COMMENT AGENDA 143 (2015), http://media.iccsafe.org/codes/2015-2017/GroupA/PCH/IPC.pdf [https://perma.cc/6P8X-PSES] [hereinafter INT'L CODE COUNCIL, P40-15]; INT'L CODE COUNCIL, FINAL ACTION RESULTS ON THE 2015 PROPOSED CHANGES TO THE INTERNATIONAL CODE 7, 31 (2016), http://productionpullzone.umz7izwbxixtqs4tn8wkvgdcktq5y5tafr.netdna-cdn.com/wp-content/uploads/2015-Group-A-Final-Action-OGCV.pdf [https://perma.cc/WP4C-RAHH] [hereinafter INT'L CODE COUNCIL, FINAL ACTION RESULTS] (noting adoption of the amendment subject to proposed change in Public Comment 2).

142. *See* INT'L CODE COUNCIL, P40-15, *supra* note 141, at 143.

143. *Id.* at 143 (quoting Julius Ballanco, JB Engineering and Code Consulting, who submitted the proposed language that was ultimately adopted).

144. INT'L CODE COUNCIL, FINAL ACTION RESULTS, *supra* note 141, at 1; *see* David S. Collins, *New Code Provision for Gender-Neutral Restrooms*, AM. INST. ARCHITECTS (June 28, 2016, 11:44 PM), https://network.aia.org/blogs/cindy-schwartz/2016/06/28/architects-propose-design-solutions-for-equitable-restrooms [https://perma.cc/VM3J-VWF2]; John Ewoldt, *In Restroom Design, Private Is the New Public*, STAR TRIB. (July 17, 2016, 9:58 AM), http://www.startribune.com/in-restroom-design-private-is-the-new-public/387110981/ [https://perma.cc/85SL-TD9J].

145. The International Building Code (which includes the pertinent provisions of the International Plumbing Code related to single user restrooms) has been adopted in fifty states, the District of Columbia, Guam, Northern Mariana Islands, New York City, the U.S. Virgin Islands, and Puerto Rico. Int'l Code Council, Adoptions of the International Codes (Jan. 2017) (on file with the North Carolina Law Review).

attempt at NYU to include an all-gender, multi-user restroom as part of a building reconstruction.[146] After exploring the forces that doomed the endeavor,[147] Molotch asks, "What Would a Better Bathroom Look Like?"[148]—leading him to contemplate "the outlines for a utopian vision of men and women and people of all sorts sharing toilet space and shaping social life."[149]

Molotch sets forth prototypes for both a large-scale multi-user restroom and for an office-scale multi-user restroom.[150] Though an examination of the specifics of his proposals is beyond the scope of this Article, suffice it to say that the layouts Molotch proposes are deeply sensitive to the needs of all people using public restrooms, needs not only of able-bodied, cisgender adults, but also of children, persons with disabilities, the aged, parents with children, transgender people, etc. The proposed designs enable "people [to] sort themselves out by the equipment they need rather than what they putatively *are*."[151] Molotch observes:

> [H]anging a sign on the door does not keep miscreants out. To whatever degree gender separation implies a false sense of security (and lessens it by lowering the number of people around), it blocks the unisex configuration that might alleviate not only the criminality problem but the other difficulties as well. Ironically, it might be especially useful to avoid gender segregation when men dominate in the environment because that is the most likely condition when a woman would find herself the only person in the women's room. Maybe imposition of gender segregation, aimed at enhancing security, undermines it . . . .[152]

Simply put, having more eyes on the street assures everyone of safer surroundings. Gender-designated door signs have little effect in deterring criminals and sexual predators intent on perpetrating their dastardly deeds.

More recently, architect Joel Sanders and transgender historian Susan Stryker have challenged the very assumption that restrooms in

146. Harvey Molotch, *On Not Making History: What NYU Did with the Toilet and What It Means for the World*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING, *supra* note 24, at 255, 264.

147. *Id.* at 258 ("Administrative Reluctance"); *id.* at 260 ("Building Codes and Higher Authorities"); *id.* at 261 ("Internal Politics of Sensitivity and Awareness").

148. *Id.* at 264.

149. *Id.* at 264.

150. *Id.* at 266–67.

151. *Id.* at 265.

152. *Id.* at 271.

public places must be segregated by sex.[153] Instead, they advocate for all-gender, multi-user public restrooms.[154] While not ignoring the legitimate dangers that people face in public bathrooms,[155] they attempt to "get[] beyond problematic ideological misconceptions and prejudices that still haunt our thinking."[156] Sanders and Stryker argue that achieving this goal requires a shift from a narrow focus on gender neutrality to the broader goals of gender and human diversity.[157]

Their proposed architectural solution would replace the sex-segregated facility with a public restroom that is configured as a "single open space with fully enclosed stalls."[158] Like Molotch, they suggest that "by consolidating a greater number of people in one room rather than two, the unisex, gender-neutral bathroom provides safety in numbers: increasing bathroom occupancy reduces risks of predation associated with being alone and out of sight."[159]

CONCLUSION

The opposing parties in the federal litigation over H.B. 2 have arrived at an impasse. On one side are the State plaintiffs and others concerned with protecting the privacy, safety, and dignity of the people of North Carolina—in particular women and girls—when they enter public restrooms. On the other side are organizations and individuals concerned that *everyone*—not just people who fit traditional molds of normalcy—has access to safe and accessible public restrooms. Moreover, the Trump administration's recent withdrawal of support for transgender students in public restroom cases raises critical questions as to whether the federal government has any further interest in supporting the rights of transgender people.[160]

While the final act of the "morality play" unfolding in North Carolina remains uncertain, the underlying conflict exemplifies the ongoing national debate over the rights of transgender people.[161] These

153. Joel Sanders & Susan Stryker, *Stalled: Gender-Neutral Public Bathrooms*, 115 SOUTH ATLANTIC Q. 779, 781 (2016).

154. *Id.*

155. *Id.* at 781.

156. *Id.*

157. *Id.* at 782.

158. *Id.* at 783.

159. *Id.*

160. *See supra* notes 3.

161. *See* Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1376–77 (2017) (noting that "[d]espite North Carolina's punishing treatment [for the passage of H.B. 2], the 2017 legislative year opened with a raft of proposed 'bathroom-of-one's-birth' laws").

conflicting views can be directly attributed to the unquestioned architectural configuration of the sex-separated, multi-user restroom, an architectural icon shrouded in cultural understandings and social conventions that date back to the late nineteenth century. Those understandings and conventions effectively caused the litigants to distort the truths about the lives of transgender people, who are still denied safe and accessible public restrooms. The time has come to topple the sex-segregated, multi-user restroom from its pedestaled position in the domain of architecture and engage in creative thinking about new ways to configure public restrooms that serve the needs of all people.